IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

No. 8

MARGARET M. McGOWAN, ET AL.,
Appellants,

v.

STATE OF MARYLAND,
Appellee.

ON APPEAL FROM THE COURT OF APPEALS OF THE STATE OF MARYLAND

BRIEF OF APPELLANTS

OPINION BELOW

The opinion of the Court of Appeals of Maryland is reported in 151 A. 2d 156, 220 Md. 117.

JURISDICTION

This suit was brought under 28 U.S.C. Sec. 1257(2) to reverse the Court of Appeals, the highest Court of the State of Maryland, whose mandate was filed May 14, 1959, and notice of Appeal was filed in that Court on August 3, 1959. The jurisdiction of the Supreme Court to review this decision by direct appeal is conferred by Title 28 U.S.C. Section 1257(2). Order noting Jurisdiction on April 25, 1960.

QUESTIONS PRESENTED

Whether the Sunday Blue Laws applicable to Anne Arundel County are unconstitutional in that

I. They contravene the 14th Amendment to the Constitution of the United States and Articles 19 and 23 of the Maryland Declaration of Rights because they embody arbitrary and capricious classifications which unlawfully discriminate in favor of certain sales and against others.

II. The legislature in its enactment of the law has deprived citizens of one part of the State of rights and privileges which they enjoy in common with the citizens of all other parts of the State constituting classification legislation for Anne Arundel County making certain Sunday Sales a crime.

III. They are arbitrarily discriminatory and so vague as to fail to give reasonable notice of the conduct intended to be prohibited thereby.

IV. The Maryland Sunday Blue Laws applicable to Anne Arundel County violate the guarantee of freedom of religion contained in the 1st and 14th Amendments of the Constitution of the United States.

STATUTES INVOLVED

Art. 27, sec. 492.

Art. 27, sec. 524.

Art. 27, sec. 522.

Art. 27, sec. 509.

Art. 2B, sec. 28, (a).

Code of Public Local Laws of Anne Arundel County (Flack, 1947), secs. 384-385.

Resolutions of County Commissioners of Anne Arundel County:

March 11, 1958.

Oct. 7, 1958.

Article 19, Constitution of Md.

Article 23, Constitution of Md.

STATEMENT OF THE CASE

These appeals are from convictions by the Circuit Court of Anne Arundel County on October 28, 1958, in seven Sunday "Blue Law" cases, which were consolidated and tried before the Court without a Jury.

The Appellants, who were fined $5.00 and costs were employees of a company known as "Two Guys from Harrison", which about 10 days before the arrests made in these cases, opened a general merchandising store on Ritchie Highway in the Glen Burnie area of Anne Arundel County. The Appellants were convicted of making sales on Sunday, September 28, 1958, in violation of section 521 of Article 27 of the Maryland Annotated Code, which prohibits the sale of merchandise, with certain stated exceptions on Sunday. The Appellants, McGowan and Joswiak, were convicted of selling a three-ring loose-leaf binder and a can of Simoniz Floor Wax. The Appellants, Hopper, Shifflett, Schepps and Mayers were convicted of selling a stapler and staples. The Appellant Sawyer was convicted of selling a toy submarine.

ARGUMENT

I. THE SUNDAY BLUE LAWS APPLICABLE TO ANNE ARUNDEL COUNTY ARE UNCONSTITUTIONAL IN THAT THEY CONTRAVENE THE 14TH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES AND ARTICLES 19 AND 23 OF THE MARYLAND DECLARATION OF RIGHTS BECAUSE THEY EMBODY ARBITRARY AND CAPRICIOUS CLASSIFICATIONS WHICH UNLAWFULLY DISCRIMINATE IN FAVOR OF CERTAIN SALES AND AGAINST OTHERS.

Maryland's first Blue Law of 1692-1715 enacted under a lord proprietor of the colony, forbade anyone to do any bodily labor or occupation upon the Lord's Day commonly called Sunday, works of absolute necessity and mercy excepted. This statute changed slightly in 1723, and 1920, has substantially its original form, and is now codified as Article 27, section 492. The statute was said not to infringe the constitutional guarantee of religious freedom in a long dictum in the old case of *Judefind v. State*, 78 Md. 510 (1894), in which the Court held that the defendant could properly be convicted under the statute for husking corn on Sunday. The dictum in the *Judefind* case was re-affirmed in *Levering v. Williams*, 134 Md. 48, which struck down an attempt by Baltimore City to permit professional baseball on Sunday as being in conflict with the general statute prohibiting all bodily labor on Sunday except works of charity and necessity, which the Court held was constitutional.

However, the instant prosecutions under which Margaret M. McGowan, et al., were convicted were not brought under the general Sunday bodily labor statute before the court in the *Judefind* and *Levering* cases, but under Article 27, section 521 specifically dealing with Sunday sales.

Purporting to be applicable throughout the State, this law provides that no person in the State may sell, dispose

of, barter, deal in or give any article of merchandise on Sunday with the following stated exceptions: Retailers may sell and deliver tobacco, cigars, cigarettes, candies, sodas, soft drinks, ice, ice cream, ices, and other confections, milk, bread, fruits, gasoline, oil and grease, and the statute also exempts periodicals, newspapers and apothecaries. However, Article 27, section 521 is not the only statutory provision respecting Sunday sales in Anne Arundel County. In 1941, the Legislature passed section 509 of Article 27 which repeals both section 492 and section 521 (as well as section 522) another law which on its face is generally applicable throughout the State so far as applicable to Anne Arundel County to the extent that the earlier statutes prohibit the operating on Sunday of any bathing beach, bathhouse, amusement park, dancing saloon, picnic groves, amusement rides, amusement devices, entertainments, shows, or the leasing or renting of boats, tables, chairs, or beach umbrellas. Section 509 also specifically permits, in the disjunctive, the sale or selling at retail of any merchandise essential to or customarily sold at or incidental to the operation of these occupations or business. In addition Article 2B of the Code as enacted in 1933 and 1935, permitted the holders of beer licenses in Anne Arundel County to sell beer on Sunday; and in *Anne Arundel County v. Thomas*, 172 Md. 18, the Maryland Court of Appeals held that the operator of a tavern was entitled to an injunction against the enforcement of the Sunday Blue Laws on the ground that permission to sell beer on Sunday in Anne Arundel County granted by the State Alcoholic Beverage Statutes superseded the prohibition of such sales theretofore contained in what is now section 521 of Article 27. At present Article 2B, section 28, provides for the right of numerous licensees, in Anne Arundel County, including general taverns with or without musical entertainment to sell on Sunday not only beer but all kinds of alcoholic

beverages. Finally, by chapter 321 of Acts of 1943 sections 383 and 384 of the Code of Public Local Laws of Anne Arundel County, slot machines, pin-ball machines, and bingo in that county were legalized and are freely played on Sunday, being exempt from the Blue Laws.

The appellants were convicted of selling on Sunday, September 28, 1958, a 3-ring loose leaf, a can of Simoniz, stapler and staples and a toy submarine. Anne Arundel County, possessing many beach and shore resorts, several within the immediate area of the "Two Guys from Harrison" Store, allows ostensibly the sale of some of these items under Article 27, section 509, pertaining to beaches, amusement park, etc. The law on Sunday sales in Anne Arundel County is thus challenged upon the ground that it is special or class legislation. The law does not extend to the sale of all classes of merchandise or all vocations. The exempted items in the statute are neither necessary nor charitable. The law although purporting to be general in the sense that it affects alike all engaged in the business of selling general merchandise, lacks the element of uniformity in the legal meaning of that term because it imposes upon them restrictions. It was stated in *The City of Denver v. Rach*, 26 Col. 530 (1899) p. 533:

> "It certainly cannot be of any benefit to either the welfare or good government of the city, to limit the exercise of a common right to engage in the business of merchandising in the city, by arbitrarily imposing upon dealers in certain articles disabilities upon Sunday, and yet allow others, who happen to be engaged in a business or avocation of a different character, neither necessary nor charitable, to continue it upon that day, although the effect upon the public generally, by permitting such business or avocations to be carried on would be the same as would result from the carrying on of business on Sunday by those prohibited from so doing."

The appellants are deprived of due process of law because the Sunday Blue Laws discriminate between different kinds of commodities. This contention has been raised in many cases, and although usually denied, has been sustained in others.[1]

Maryland has held in *Ness v. Supervisors*, (1932) 162 Md. 529, 160 A. 8, that a City ordinance permitting specified amusements, games and sports for profit after 2:00 P.M. on Sunday and allowing these, and others, if not for profit, at any time on Sundays, and also permitting retail sales on Sunday within restrictions not to involve such discrimination between activities permitted and not permitted as to violate the Fourteenth Amendment to the United States Constitution and the Maryland Declaration of Rights. Nevertheless, a municipal ordinance prohibiting the sale of commodities on Sunday with certain exceptions was held invalid and unconstitutional in *Gronlund v. Salt Lake City*, (1948), 113 Utah 284, 194 P. 2d 464, where it appeared that the ordinance provided that it should be unlawful to offer or expose for sale or sell on Sunday "any commodity" except that various items were exempted from the operation of the ordinance. The Court stated that "Even bearing in mind the rule that the classification upon which a Sunday closing law is based is within the discretion of the legislative branch and hence will be upheld unless clearly arbitrary, it is difficult to conceive of a fair reason for some

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[1] 57 A.L.R. 2d footnote 1, page 982, and cases cited.

of the items excep[illegible] from the present ordinance, there being no reason why certain commodities should be sold, while others of equal usefulness should be prohibited from being sold. In this regard the court said that it was

> "... arbitrary to permit the sale of a can of beer on Sunday and prohibit the sale of a can of orange juice or a can of coffee." 194 P. 2d 468.

The Supreme Court of the United States in *Old Dearborne Distributing Co. v. Seagrams Distillery Corp.*, 299 U.S. 183 stated, in order to be held constitutional, a classification must not only be reasonable and not arbitrary but must rest upon a difference having a fair and substantial relation to the object of the legislation. *Colgate v. Henry*; 296 U.S. 404, 56 S. Ct. 253. In *Anderson v. Antonacci*, 62 So. 25, the Florida Court invalidated a general Sunday law which expressly exempted newspapers, theatres, filling stations, restaurants, grocery and drug stores, hotels, parking lots and transportation companies, but not automobile dealers and garages. In the *City of Denver v. Bach* (1899), 26 Col. 530; 58 P. 1089, the Supreme Court of Colorado held an ordinance unconstitutional as a class legislation prohibited by the Colorado Constitution. Likewise, in *Mergren v. Denver*, 104 P. 395, 46 Colo. 85, the same court invalidated a law precluding Sunday sale of meats and groceries as unconstitutional. In dealing with the general principles of Sunday sales to specific Sunday sales statutes, it is to be noted in the editorial comment in 57 A.L.R. 2d 975, section 1 (Sunday Law—Discrimination [b] Summary and analysis, pp. 978-80), that the weight of authority with regard to Sunday sales statutes cannot validly be determined by comparing the number of cases in which Sunday sales statutes have been sustained with the number in which they have been struck down, but the constitutional question in any case can be decided only "in connection with the particular

Sunday Law in question" 57 A.L.R. 2d 978. Also it is to be mentioned that the tendency in the more recent cases is to be less indulgent in viewing the statutory distinctions than were the earlier cases. This stricter attitude seems in part to be due to a change in public values and sentiments regarding Sunday,* resulting from the spread of suburban liv-

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*Note: *Syracuse Law Review* 6:362 — 1954-1955:

". . . .The original emphasis of the laws, in accord with early English and American thought, was largely to influence and control the religious and moral character of the population." ("The spirit of the act (29 Car. 1, C7) is to advance the interests of religion to turn a man's thoughts from his worldly concerns and to direct them to the duties of piety and religion"). *Fennell v. Ridler*, 8 D. & R. 204, 108 Eng. Rep. 151, 152 (1826). Time and changing social patterns resulted in the relaxation of this politically "coerced morality". Emphasis gradually shifted towards protecting from disturbance those who held Sunday to be sacred.

In 1953, a New York Court held commercial washing of cars on Sunday not a violation of law because the operation did not seriously interrupt the repose and religious liberty of the community. *People v. Helton*, 119 N.Y.S. 2d 692.

"However necessary and natural Sunday Laws may be in terms of man's physical and spiritual needs, they must keep pace with the times."

Boston Law Review 39:543 *A General Survey of the Sunday and Holiday Laws in New England:*

"The purpose of the early Sunday laws was essentially to provide for the proper observance of the Sabbath. Obviously, today, such a basis for a law might raise serious constitutional objections. The most recent rationale which has been advanced to justify the law is the contention that its purpose is to establish a day of rest in accordance with a state's police power to provide for the health and welfare of its citizens. Such a theory has particular significance during this nation's period of industrial advancement when laborers were at a bargaining disadvantage in respect to management. However at present, there is a question as to whether the Sunday and Holiday 'closing' laws are necessary, or even desirable. . . ."

Volume 2 — Attorney General's Opinions State of Maryland (1917): Albert C. Ritchie, stated, as to whether newspapers are goods, wares and merchandise within meaning of the term as used in the statute that in view of progress of newspaper and its character and influence, newspaper sales of Sunday, not prohibited.

As to the right of the owner of Riverview Park to maintain a hotel, sell soft drinks, ice-cream, etc., operate gravity railway, canal, ferris wheel and other amusements on Sunday, on March 3, 1919, Albert C. Ritchie, Attorney General, advised the Secretary of the

ing and also from an increased awareness on the part of the courts that the growing number of exemptions and *ad hoc* distinctions which have corroded the original purpose and design of the Sunday statutes is not so much the result of legislative classification based on intuitions of public policy as it is of effective lobbying on the part of numerous particular interests which have succeeded in destroying all semblance of rational purpose underlying the pattern and structure of Sunday legislation.

The more recent attitude towards the Sunday Blue Laws is well summarized in Editorial Note, *Sunday Blue Laws: An Analysis of Their Position in Our Society*, 12 Rutgers Law Review 505 (1958). The note points out that the rea-

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Board of County Commissioners that the amusements on Sunday afford healthy recreation from work and welcome relief from summer heat to thousands of people.

December 2, 1920, Attorney General Alexander Armstrong in a letter to General Charles D. Gaither, Police Commissioner, Court House, Baltimore, Maryland:

"There are decisions of an earlier period in other States which hold that it is unlawful to publish a newspaper on Sunday, to sell a newspaper on Sunday and to operate a steam train on Sunday but I cannot believe that those acts would now be considered violations of the Sunday laws. *The complexity of our modern life has presented new living conditions whose requirements have led to a more liberal construction and application of these restrictive measures.* (Emphasis supplied.) If they were given a literal interpretation it would be illegal for churches to maintain paid choirs. The church member who is driven to service by his paid chauffeur would be a violator of the law, and many other acts now sanctioned by public approval, would formerly be declared improper, and even at this time, by rigid construction, might be considered to be embraced within the operation of these statutes."

In a letter to Charles D. Gaither, Police Commissioner, the Attorney General stated:

By a strict interpretation of Section 483, Art. 27 it would be illegal to employ on Sunday domestic servants for household duties, chauffeurs for the operation of automobiles, musicians for playing in a municipal band, organists and members of choirs in churches where such persons are paid for their services. All these modes of employment on Sunday have been permitted for a long period of time without objection notwithstanding provisions of law above referred to.

sons for the recent spurt in Blue Law litigation include the five day week, the days off other than Sunday, the recent spread of population to the suburbs, the consequent increase in the number of people who spend at least part of Sunday in their automobiles, the decline and relative inconvenience of urban shopping centers, and the growth of the custom on the part of many people to combine the Sunday family drive with family shopping at a convenient location where and when all the members of the family can be together. In this context the note points out:

> "Thus, the Sunday blue laws often remain unenforced until some private group agitates against certain individual interests which they oppose. This inevitably leads to discriminatory enforcement. As a result of this, the blue law becomes a weapon in an economic struggle, a use scarcely conceived by the originators of this type of legislation . . ." 12 Rutgers Law Review 508.
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> "The state statutes have evidenced a wide variety of unexplainable and irreconcilable classifications and exceptions. The only possible explanation seems to lie in the ability of the various pressure groups to have their desires solidified into legislation . . ." 12 Rutgers Law Review 511.
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> "The only legitimate ends which the Sunday laws allegedly achieve are the procurement of a day of rest for the public and the encouragement of worship on Sundays." 12 Rutgers Law Review 513.

The court considering the validity of a Sunday law can, however, render valuable aid against the other chief evil of the blue laws: discrimination. To the present, the courts have not been very effective in preventing this, mainly because of the utilization of the doctrine of judicial self-restraint. The rationale behind judicial self-restraint is that it is the job of the legislature to protect the health of the community, and if it is necessary to make some work

illegal on Sunday to effectuate this end the court will not interfere because the Legislature has sworn to uphold the constitution just as the courts have, and moreover, the Legislature is deemed more competent in this sphere because of its access to statistics and the availability of experts to aid it in determining which groups most need a day of rest.

The need for this type of judicial restraint was pointed up dramatically in the thirties and the rationale has much worth. But, it is only valid when the major premise is a reality; that is, when the Legislature does have better sources than the court to determine what classification should be made and when it has in fact used these sources as the basis for the classifications found in the statute. In regard to the Sunday laws it is probable that the Legislature with its resources is in a better position to determine what is best for the health of the community, but the statutes and their history seem to indicate that it is not the legislative materials but rather the pressure groups which dictate the classifications. 12 Rutgers Law Review 518.

There are very few cases specifically dealing with Sunday sales statutes closely resembling the pattern applicable to Anne Arundel County, possibly, no doubt, because there are very few Legislatures which have gone to the extent of passing quite such statutes. The cases which have discussed such statutes have held the statutes to be invalid. The case most closely in point which counsel have found is *Gronlund v. Salt Lake City*, 113 Utah 284, 194 P. 2d 464. The statute in that case was somewhat less vulnerable than the statutes in the case at bar, but it shared one important feature of the Anne Arundel County statutes, namely an exception in favor of the sale of beer on Sunday. The Utah court in an earlier case, *Broadbent v. Gibson*, 105 Utah 53, 140 P. 2d 939, pointed out that statutes regulating the com-

modities which may be sold on Sunday had almost uniformly been upheld and that "The courts point out that any one can sell any one of the exempted commodities and that there is, therefore, no discrimination as long as the legislature stays within proper limits in providing for exceptions" (140 P. 2d 944 quoted at 194 P. 2d 467). The Court also gave full effect to the rule that the ordinance in question was presumably constitutional and that discrimination is the essence of classification and is not objectionable unless founded upon differences which the court is compelled to find arbitrary and unreasonable, citing 12 Am. Jur. *Constitutional Law*, sec. 521, p. 217 to the effect that "Before a court can interfere with the legislative judgment it must be able to say that there is no fair reason for the law that would not require with equal force its extension to others which it leaves untouched". 194 P. 2d 466.

Giving full weight to these considerations, the court nevertheless held as follows:

> "While the ordinance does not expressly prohibit the carrying on of businesses of a particular type, we cannot close our eyes to the fact that its necessary effect is to do so. A clothing, hardware, or jewelry store does not engage in selling any of the excepted products, nor would it be economically feasible for a large grocery or vegetable store to open its doors on Sunday for the sale of milk, tobacco, and candy . . ." (194 P. 2d 467).
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> "The principal attack upon the ordinance in question in the brief and argument on behalf of appellant is directed at the exceptions in the enactment from the general prohibition against sale and offering for sale of commodities on Sunday . . . Even bearing in mind the rule that the classification upon which a Sunday law is based is within the discretion of the legislative branch and hence will be upheld unless clearly arbitrary, it is difficult to conceive of a fair reason

for some of the items excepted. It is readily apparent that some of the exceptions are clearly based on necessity. But as to others, even considering the desirability of promoting recreational activity on Sunday, no fair reason suggests itself as to why their sale should be permitted on Sunday while the sale of other commodities is prohibited . . . *The classification being on a commodity basis, it is arbitrary to permit the sale of a can of beer on Sunday and prohibit the sale of a can of orange juice or a can of coffee.*" (Emphasis supplied.) 194 P. 2d 468.

Again in *Deese v. Lodi*, 21 Cal. App. 2d 631, 69 P. 2d 1005, the ordinance permitted the following establishments to be exempt from the operation of the general Sunday law among others: taverns, places where liquid beverages are sold, pool or billiard halls and skating rinks. The court held that this was an unconstitutional discrimination against the proprietor of a grocery store. The court said:

". . . just how the conduct of a grocery store in the City of Lodi is more inimical to the cleanliness, orderliness, and the public health of the City of Lodi than . . . a beverage establishment [such as are conducted under various euphemistic names but . . . in fact saloons] is difficult to perceive. . . .

"We think it unquestionable that the closing of grocery stores and fruit stands on Sunday, and the leaving open . . . [of the exempted establishments] is . . . discriminatory . . . *We may add what we know is common knowledge, that such excepted places are the very places where acts of disorderliness do occur, are expected to occur, and are of common occurrence* . . . In other words, the Lodi ordinance has neither morals, Christian observance of Sunday, public health, welfare, or safety to support it, in that it specifically excludes a long line of occupations, businesses, or whatever they may be called where everything contrary to good morals, Christian observance of Sunday, safety, or public welfare may be found . . . We do not see any escape from the foregoing that Ordinance Number 220

of the City of Lodi is not an ordinance calculated to promote the public health, morals, safety, welfare, cleanliness, or orderliness, much less the Christian observance as the day of rest of any particular day, and is arbitrary in its classifications and discriminatory in its attempted application, and is therefore void." 69 P. 2d 1009-1011. (Emphasis supplied.)

The cases upholding statutes and ordinances which exempt certain types of commodities—generally similar to the exemptions contained in Section 521 of the Maryland law but quite dissimilar to the pattern present in this case—, taken as a whole, often go out of the way to point out, as in *Hoffman v. Justus*, 91 Minn. 447, 98 N.W. 325, in support of the distinctions made in a particular statute, that "the statute clearly prohibits the sale of intoxicating drinks in any form on Sunday . . ." 98 N.W. 326.

In the instant case the statutory pattern permits what Judge Mason in *State v. Fearson*, 2 Md. 310, 313 (which affirmed a conviction for permitting persons to bet on cards on Sunday) characterized "independent of any statutory prohibition" as "a gross offense against decency and public morals" which "richly merits punishment". In the instant case, the court below admitted that the distinctions made in the Anne Arundel statutes are "ridiculous" (Transcript p. 83). When the statutory distinctions get to this point it is the court's duty to declare the statute invalid, and the court below erred in allowing a statutory pattern embodying such distinctions to stand. The sale of intoxicants, the opening of general taverns on Sunday, and various forms of gambling have been generally regarded as *par excellence* the very type of violations of the purposes of the Sunday laws which makes such laws reasonable, to the extent that some statutes impose greater penalties upon sellers of intoxicants than upon those who violate the Sunday sales laws generally. See Note, 8 A.L.R. 567. To permit the sale

of intoxicants and the operation of slot machines, pinball machines and bingo on Sunday, as well as the other exceptions which the statutes here in question permit, is to do what the court condemned in *Broadbent v. Gibson*, 105 Utah 53, 140 P. 2d 939, 946 where the court said:

> "The exceptions in the Utah Sunday closing statutes are so broad that they in effect change the nature of this act from a general closing law, with exceptions, to a law aimed without sufficient legal reason, at certain classes of businesses with a general exception to other classes which in effect is a grant of a special privilege to the excepted class while without legal excuse denying them to others."

It is one thing to uphold a pattern of Sunday laws which is not perfectly symmetrical, or in which "there are discriminations which cannot be explained or justified by reasons," and quite another thing to uphold, as the trial court did, Sunday legislation whose admittedly "ridiculous" classifications expressly permit the kinds of sales and activities which are the very antithesis of the spirit of Sunday observance and prohibit sales and conduct which by any test are incomparably more innocuous than the sales and activities permitted.

II. THE LEGISLATURE IN ITS ENACTMENT OF THE LAW HAS DEPRIVED CITIZENS OF ONE PART OF THE STATE OF THE RIGHTS AND PRIVILEGES WHICH THEY ENJOY IN COMMON WITH THE CITIZENS OF ALL OTHER PARTS OF THE STATE CONSTITUTING CLASSIFICATION LEGISLATION FOR ANNE ARUNDEL COUNTY MAKING CERTAIN SUNDAY SALES A CRIME.

This law allowing sales of goods in one area and prohibiting them in another is purely directed to a particular

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[5] Article 27, Section 509 — Beaches, Amusement Parks, Picnic Groves, Etc. in Anne Arundel County.

It shall be lawful to operate, work at, or be employed in the occupations of operating any bathing beach, bathhouse, amusement park,

class of merchants and exempts others without any substantial reason behind it as to why it is made to operate upon them and not generally upon all dealers in merchandise or all vocations. It compels certain merchants to refrain from doing business on Sunday and yet allows their neighbors and competitors engaged in the sale of articles permitted under section 509, article 27, a privilege which they are denied. Sunday Law prohibiting the operation of stores with a number of specific exceptions, has been held unreasonable and discriminatory."

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dancing saloon, the sale or selling of any novelties, souvenirs, accessories, or other merchandise essential to, or customarily sold at, or incidental to, the operation of the aforesaid occupations and businesses, at retail, picnic groves, amusements, games, amusement rides, amusement devices, entertainments, shows and the hiring or renting of boats, tables, chairs, beach umbrellas, on the first day of the week, commonly called Sunday, within Anne Arundel County, said 492, 521, and 522 of this article are repealed, ~~in so far~~ and to the extent that they ~~prohibit the~~ operating of and/or the working of or employment of persons in the operation of any bathing beach, bathhouse, amusement park, dancing saloon, the sale or selling at retail of any merchandise, essential to or customarily sold or incidental to the operation of the aforesaid occupations or business, picnic groves, amusements, games, amusement rides, amusement devices, entertainments, shows and the hiring and renting of boats, tables, chairs, beach, umbrellas, on the first day of the week commonly called Sunday, in Anne Arundel County.

"*Elliott v. State*, (1926), 29 Ariz. 389, 342 P. 340, 46 A.L.R. 284; *Ex Parte Westerfield* (1880), 55 Cal. 550, 36 Am. Rep. 47; *Gaetano Bocci & Sons v. Lazendale* (1930), 208 Cal. 720, 284 P. 654; *Justesen's Food Stores v. Tulare* (1938), 12 Cal. 2d 324; *Deese v. Lodi* (1937), 21 Cal. App. 2d 631, 69 P. 2d 1005; *Denver v. Bach* (1899), 26 Colo. 530, 58 P. 1089; *Mergen v. Denver* (1900), 36 Colo. 385, 104 P. 899; *Allen v. Colorado Springs* (1937), 101 Colo. 498, 75 P. 2d 141; *Henderson v. Antonacci*, (1952), 62 So. 2d 56; *Mt. Vernon v. Julian* (1938), 369 Ill. 447, 17 N.E. 2d 52, 119 A.L.R. 747; *McKaig v. Kansas City* (1953), 363 Mo. 1033, 256 S.W. 2d 845; overruling *St. Louis v. DeLassus* (1907), 205 Mo. 578, 104 S.W. 12; *Arrigo v. Lincoln* (1951), 154 Neb. 537, 48 N.W. 2d 643; *Cowan v. Buffalo* (1935), 157 Misc. 71, 282 N.Y. 580; *State v. Blackwelder* (North Carolina) (1928), 196 N.C. 561, 120 S.E. 196; *Ex Parte Ferguson* (1937), 62 Okla. Crim. 145, 70 P. 2d 1094;

The case at bar may be distinguished from *Re Sumida* (1918), 177 Cal. 388. In that case the Court held the exclusion of the businesses namely hotels, boarding houses, lodging houses, restaurants, bakeries, etc. did not make the ordinance invalid since there appeared to be a well-founded distinction between the two classes of business, one of which was allowed to keep open, and the other was required to close on Sunday since there was an element of necessity in regard to those which were allowed to keep open.

In the case at bar, there can not under any sense of the word be a necessity in selling "novelties, souvenirs, accessories or other merchandise essential to or customarily sold at, or incidental to the operation of the aforesaid occupations and business . . ." Assuming the reasoning of *Mt. Vernon v. Julian* (1938), 369 Ill. 447, 17 N.E. 2d 52, 120 A.L.R. 747, to be applicable, there appears to be no reason why a dressmaker's shop should be open while a cigar store should be required to close, nor why a dry good store should be required to close while a news stand continued to operate. The Court went on to say that the distinctions

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Broadbent v. Gibson (1943), 105 Utah 53, 140 P. 2d 939; *Gronlund v. Salt Lake City* (1948), 113 Utah 284, 194 P. 2d 464.

Laws such as these have been invalidated in cases listed below: *Hot Springs v. Gray* (1949), 215 Ark. 243, 219 S.W. 2d 930; *Theisen v. McDavid* (1894), 34 Fla. 440, 16 So. 321, 26 L.R.A. 234; *Lo Tempio v. Niagara Falls* (1938), 166 Misc. 338; *Ex Parte Ferguson* (1937), 62 Okla. Crim. 145, 70 P. 2d 1024; *Ex Parte Hodges*, 65 Okla. Crim. 69, 83 P. 2d 201.

Judge Michaelson, Nisi Prius Judge, stated in his remarks (pp. 83-84 of Transcript of Record):

"We're living in a complex age, things are moving at a rapid pace. In certain sections of our state and certain sections of the country you have still a puritanical approach to certain things that go on on Sunday; in other sections you have a more liberal approach, you might say, in the vernacular, this is an unpopular law, enforcing this law this way; we don't think it ought to be the law and you can criticize it in more ways than one. One comment of which we were all

between those businesses required to remain closed and those allowed to open appeared to be entirely arbitrary without relation to public health, safety, morals or welfare. In *Allen v. Colorado Springs* (1937), 101 Colo. 498; 75 P. 2d 141, holding an ordinance invalid, the court observed that the ordinance thereby created a condition in which it was perfectly lawful for a retail drugstore on Sunday to sell staple groceries, while the same ordinance prohibited a grocery store operator from selling the identical items. The discrimination between grocery stores and other businesses created by the ordinance was held to make the ordinance invalid. The Court in *Ex Parte Hodges* (1938), 65 Okla. Crim. 69, 83 P. 2d 201, holding invalid an ordinance, stated at p. 204:

> "The language of the ordinance shows it is not a general Sunday closing ordinance but a special one directly aimed without any apparent legal reason at certain classes of business with a general exception to another class and does therefore in effect grant special privileges and immunities to certain classes of business with a general exception to another class and does therefore in effect grant special privileges and immunities to certain classes of business while without legal excuse denying them to others."

Thus the question is raised as to whether Article 27, section 509, purporting to be a State-wide law is unconstitutional on the basis that the Legislature has attempted to deprive citizens of one part of the State of the rights and

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cognizance [*sic*] was mentioned this morning, that it seems to be ridiculous that you can buy beer and whiskey on Sunday and set unfortunately, if you had to attend a wedding or a reception or a dinner and opened up your bureau drawer and found out you didn't have an undershirt because maybe some nice lad gotten in there and eaten up the last one you had and you had to run around the corner and get one so you'd be dressed for the party or occasion, why, that's against the law now, and the Almighty is going to send you to eternal damnation because you go out and buy an undershirt under all the conditions."

privileges which they enjoy in common with the citizens of all other parts of the State.

C. Ferdinand Sybert, Attorney-General of the State of Maryland, commenting on House Bill No. 265 on April 30, 1959, stated:

> "Similarly, the lack of any apparent basis for the exclusion of certain counties from a State-wide regulatory policy which would appear to be equally applicable to them may well make the bill discriminatory legislation in violation of Article 23 of the Declaration of Rights. The power of the Legislature to restrict the application of statutes to localities less in extent than the entire State is not unlimited; it cannot be used to deprive the citizens of one part of the State of the rights and privileges which they enjoy in common with the citizens of all other parts of the State, unless there is some difference between the conditions in the territory selected and in the conditions in the territory not affected by the statute sufficient to afford some basis, however slight, for classification.' *Maryland Coal & Realty Co. v. Bureau of Mines*, 193 Md. 627, 642 (1949), 69 A. 2d 471.

In the latter case referred to, the Maryland Court of Appeals stated at 69 A. 2d 477:

> "But it is equally clear that the power of the Legislature to restrict the application of statutes to localities less in extent than the State, as the exigencies of the several parts of the State may require, cannot be used to deprive the citizens of one part of the State of the rights and privileges which they enjoy in common with the citizens of all other parts of the State, unless there is some difference between the conditions in the territory selected and the conditions in the territory not affected by the statute sufficient to afford some basis, however slight, for classification. *Dasch v. Jackson*, 170 Md. 251, 270, 183 A. 534."

III. THEY ARE ARBITRARILY DISCRIMINATORY AND SO VAGUE AS TO FAIL TO GIVE REASONABLE NOTICE OF THE CONDUCT INTENDED TO BE PROHIBITED THEREBY.

Art. 27, Section 521, under which the appellants were convicted, and Art. 27, Section 509, which carves out certain exceptions, must be read together. Section 509 expressly permits certain Sunday sales in Anne Arundel County and removes such sales from the ban of Section 521. Section 509 permits "the sale or selling of any novelties, souvenirs, accessories, or other merchandise essential to, or customarily sold at, or incidental to, the operation of bathing beaches, bath houses, amusement parks or dancing saloons".* The permission of sales is a separate clause of the statute, and there is nothing in this clause which requires that the sales be made *on the premises* of a bathing beach, bath house, amusement park or dancing saloon. The statute permits the sale of merchandise which is essential to *or* customarily sold at *or* incidental to the operation of these occupations. The statute is a statute applicable throughout Anne Arundel County generally; and permits the sale of certain commodities described therein. It is not to be lightly inferred that the Legislature would have permitted sales in a dancing saloon of the same articles which it prohibited elsewhere, and indeed such a statute, which permits one type of outlet to sell the same commodities which it prohibits another outlet from selling, has generally been held unconstitutional. See *Mt. Vernon v. Julian*, 369 Ill. 447, 17 N.E. 2d 52; *Allen v. Colo. Springs*, 101 Colo. 498, 75 P. 2d 141; *Elliott v. State*, 29 Ariz. 389, 242 Pac. 340; *Arrigo v. Lincoln*, 154 Nebr. 537, 48 N.W. 2d 643.

* The permission is also phrased in sec. 509 as including "the sale or selling at retail of any merchandise, essential to or customarily sold or incidental to the operation of the aforesaid occupations or business."

The court below apparently took the view that under Section 509 the types of merchandise specified therein as permissible for Sunday sales could be sold only at the premises housing the operation which the statute permits. The Legislature, however, did not say this, and it requires a forcing of statutory language to reach this result. Penal statutes are, of course, strictly construed, and held in their application to what the Legislature actually said. The words of the statute in their plain meaning are inconsistent with the interpretation by the trial court. Appellants' contention is fortified by the terms of Art. 27, sec. 506, relating to Montgomery County, where the Legislature, when it wished to limit the exceptions to the premises of amusement parks etc. clearly provided that such exceptions were to be "within the confines" of the premises enumerated in the statute.

Section 509 is extremely vague. In order to determine whether merchandise is customarily sold at bathing beaches, bath houses, amusement parks, and dancing saloons, a merchant would be required to make a market survey before he could act with confidence, and even then, in view of the shifting patterns of merchandise, particular types of establishments are no longer limited in the lines they carry. It is common knowledge that what once used to be drug stores and food stores are now in effect department stores. Moreover, if merchandise is sold at one-third of the bathing beaches or dancing saloons in Anne Arundel County, does it qualify as being customarily sold at such places? If all of the dancing saloons or bathing beaches in Anne Arundel County should get together and institute a complete variety of new lines and products, would such products be "customarily sold" at bathing beaches and dancing saloons? In any event, even if section 509 means what the court below said it means, the fact that it gives so much

leeway to the operators of the permitted establishments in the sale of merchandise on Sunday, apart from the question of vagueness, aggravates the discriminatory character of the legislative pattern and reinforces appellants' argument on this point.

IV. THE MARYLAND SUNDAY BLUE LAWS APPLICABLE TO ANNE ARUNDEL COUNTY VIOLATE THE GUARANTEE OF FREEDOM OF RELIGION CONTAINED IN THE 1st AND 14th AMENDMENTS OF THE CONSTITUTION OF THE UNITED STATES.

The Appellants in the case at bar contend that the Sunday closing Law applicable to Anne Arundel County is in violation of the guarantee of freedom of religion. The Supreme Court of the United States in *Everson v. Board of Education*, 330 U.S. 1, 15-16 (1947), declared:

> "The 'establishment of religion' clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a Church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another."

University of Pittsburgh Law Review Vol. 1, p. 123 stated:

> "The Court further classified this freedom in stating that 'State power is no more to be used so as to handicap religions than it is to favor them.' The freedom-of-religion provisions of the First Amendment have been incorporated in the due-process clause of the Fourteenth Amendment and thus are binding on the States. Therefore it is clear that the federal constitution precludes the states from preferring or protecting one religion above all others. This is demonstrated by the statement of Chief Justice Vanderbilt that: . . . the state or any instrumentality thereof cannot under any circumstances show a preference for one religion over another. Such favoritism cannot be tolerated and must be disapproved as a clear violation of the Bill of Rights of our Constitution." *Tudor v. Board of Educa-*

tion, 14 N.J. 31, 100 A. 2d 857, 864-865 (1953). The clause against the establishment of religion by law was intended to erect "a wall of separation between church and State." *Reynolds v. U. S.* (1878), 98 U.S. 145, 164.

The very wording of the Maryland statute indicates the religious nature of the statute. Since colonial times, Christianity has been advanced by the State Legislature and Sunday observance has been decreed as mandatory.[9]

> "Sunday, or the Sabbath, was not a day for recreation in early Maryland. Under the Roman Catholic proprietors, rigid views were held about the observance of this day. By the Terms of the Toleration Act of 1649[10] any one was fined who profaned 'The Sabbath, or Lord's Day, Called Sunday, by frequent swearing, drunkenness, or by any uncil [sic] or disorderly recreation, or by working on that day when absolute necessity doth not require it'. . . ."

Several years after this, an act was passed which forbade any one to hunt or shoot a gun on Sunday. About 25

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[9] Article 27, Sec. 492 — Working on Sunday; Permitting Children or Servants to Game, Fish, Hunt, Etc.

No person whatsoever shall work or do any bodily labor on the Lord's day, commonly called Sunday; and no person having children or servants shall command, or wittingly or willingly suffer any of them to do any manner of work or labor on the Lord's day (works of necessity and charity always excepted), nor shall suffer or permit any children or servants to profane the Lord's day by gaming, fishing, fowling, hunting or unlawful pastime or recreation; and every person transgressing this section and being hereof convicted before a justice of the peace shall forfeit five dollars, to be applied to the use of the county.

The First day of the week, known as the "Lord's Day," commemorates the Resurrection of Jesus Christ and is indisputably Christological in its inception and in its essential character to this day. 1959 Ed., Encyclopaedia Britannica, Vol. 21, p. 565.

[10] Under 1649 — Toleration Act — there was no toleration for Jews. Persons who blasphemed or cursed God or denied that Jesus Christ was the son of God or denied the Holy Trinity, or even used reproachful words about the Holy Trinity could be put to death and their possessions confiscated. Nor could one make any reproachful

years later another law was passed "for keeping holy the Lord's Day". Members of the assembly thought that the new statute was necessary, since the day was being profaned.

Henry Clay was presented in Kent County "for striking tobacco on the Sabbath Day," and Captain John Russell for fighting.

The Maryland Court of Appeals in *Judefind v. State*, 78 Md. 510, at 515, stated:

> "It is undoubtedly true that rest from secular employment on Sunday does have a tendency to foster and encourage the Christian Religion — of all sects and denominations that observe that day — as rest from work and ordinary occupation enables many to engage in public worship who probably would not otherwise do so. . . . If the Christian Religion is, incidentally or otherwise, benefited or fostered by having this day of rest, as it undoubtedly is, there is all the more reason for the enforcement of laws that help to preserve it . . ."

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remarks about the Virgin Mary, or the apostles or evangelists without being fined, or whipped or imprisoned.

Case of Jacob Lumbrozo, 1658 Catholic Colonial Md. Spalding — Bruce Pub. Co. "It would appear that a few Jews were resident in Maryland from the earliest days of the colony."

Originally enacted 1692-1715, Maryland's First Blue Law forbade anyone to do bodily labor or occupation upon the Lord's Day commonly called Sunday. *Liberty Magazine* XXVI, 2-1931.

It is ironical that it is a matter of history that the State of Maryland was colonized by men who fled from ecclesiastical oppression, that they might enjoy liberty of conscience.

Citizenship and Suffrage in Maryland — Stelner (1936).

P. 33. The Jews had been prohibited from political privileges by the provision in the Constitution requiring the profession of the Christian Religion. In 1797 the first movement was made to free them from this restriction, but not until 1818 was a determined attempt made. In 1825 and 1826 the Constitution was amended and then Jews given same privileges as Christians.

A consequence of abridging the freedom to practice one religion is to a certain extent to aid — and therefore establish — another. Conversely, a consequence of establishing one religion is to induce the adherents of another to break their ties.

In the case of *Kilgour v. Miles*, recorded in 1834 in 6 Gill and Johnson 268 at 274, the Court said:

> ". . . The Sabbath is emphatically the day of rest, and the day of rest here is the 'Lord's Day' or Christians' Sunday. Ours is a Christian community, and a day set apart as a day of rest, is the day consecrated by the resurrection of our Saviour, and embraces the twenty-four hours next ensuing the midnight of Saturday. But without relying on the plea *for* the appropriate appellation of the day, or for any other aid, we think there is no difficulty, and the defendant might safely have demurred according to the doctrine of the case of *Hoyle v. Ld. Cornwallis*. . . ."

In the case of *District of Columbia v. Robinson*, District Court of Appeals, 30 App. Cas. (D.C.) 283, the crux of the decision was that it is mandatory upon all citizens to acknowledge Sunday as a day of rest. It is respectfully submitted that such an interpretation has the effect of compelling many to observe two days of rest in each week: the statutory day and the day which their religious faith constrains them to observe.

> "Members of those faiths which observe a day other than Sunday are curtailed in their activity to a greater extent than their fellow citizens. On both Saturday and Sunday, for example, Orthodox Jews and Seventh Day Adventists can neither operate business establishments nor purchase certain goods. If recreational activity is unlawful on Sunday and prohibited by their religion on another day, Sabbatarians must find their recreation on the five days usually devoted to work. Moreover, recognition by the secular authorities of the

special character of the majority's holy day may cause this minority to feel foreign and inferior. These economic and psychological consequences have a tendency to dissuade persons from practicing religions which observe a day other than Sunday. Furthermore, the effect of Sunday statutes is to make uncommitted or marginally religious individuals available for religious services on Sunday, while rendering it difficult to attract those of them unwilling to work less than six days a week to Sabbatarian services. Insofar as Sunday statutes thus induce religious conformity, the secular advantages flowing from a heterogeneous society, such as the availability of diverse views and religiously inspired cultures and the promotion of a non-provincial attitude through contact with other groups, are diminished. Since the effect of Sunday statutes upon religion often becomes a political issue, undesirable political division according to religious affiliation may be fostered. Finally, if Sunday statutes are meant for religious purposes, they are the product of a government which has, in passing them, diverted its energies from the socio-economic issues that are its proper concern."[11]

Infidels regard no day as holy. Friends hold there is no more holiness in one day than another. Jews and Seventh Day Adventists observe the seventh day, Mohammedans celebrate Friday, Khevsur's, Friday, Saturday and Sunday.[12] Buddhists — a day determined by phases of the moon and may vary from week to week. *Crown Kosher Super Market of Massachusetts, Inc. v. Gallagher*, 176 F. Supp. 466, 4 Encyl. Soc. Sci. 414 (1937) (Holidays).

[11] Harvard Law Review, Vol. 73:729, p. 734.

[12] Twelve Secrets of the Caucasus — Essad — Bey (1931) Viking Press.

CONCLUSION

The purpose of the early Sunday Blue Laws was essentially to compel the observance of the Sabbath. Through the years, State courts and Legislatures have affirmed the early holdings under States' police power theory in providing for the health and welfare of its citizens. There has been a vast change in the thinking of our nation since the Blue Laws were first presented in Colonial America. The Supreme Court of United States has last ruled on a Blue Law case in *Petit v. Minnesota*, 177 U.S. 164 (1900).

In recent years the Sunday Blue Laws have taken on a new perspective. They have become a lethal weapon in the economic war of competition. The growth of metropolitan shopping areas, affording adequate parking and one-stop shopping, has been the target of a prolific attack by in-town stores which seek to enforce the Sunday laws against their competitors. Various pressure groups and lobbies have sought legislative enactments for unexplainable and irreconciliable classifications to legalize the sale of exempted commodities.

The legal effect of the Maryland Blue Laws is that excepted commodities are allowed to be sold throughout the state. These commodities are not inherently for necessity or for charity. Further, in Anne Arundel County, the list of excepted products is enlarged so that beaches may sell additional commodities which merchants in other areas of the state are forbidden to vend.

The statute finally declares that Marylanders observe Sunday as the day of rest. This requirement has the direct consequence of making many citizens observe two days of rest in each week, the statutory day, and the day of their own religious conviction. The statute thus fosters Chris-

tianity over the other religions of the world. It is for these reasons that the appellants respectfully submit that the Maryland Blue Laws are unconstitutional and in deprivation of the basic freedoms guaranteed by the Constitution and the 14th Amendment thereto.

Respectfully submitted,

HARRY SILBERT,
A JEROME DIENER,
SIDNEY SCHLACHMAN,
200 Equitable Building,
Baltimore 2, Maryland,
For Appellants.

J. SEYMOUR SUREFF,
On Brief.